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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1941

No. ~~1211~~ 56

OPAL SAXTON DAVIS, *Petitioner,*

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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STATEMENT OF CASE

Ancil Evan Davis, husband of petitioner, met his death by accidental drowning in the Snohomish River (an arm of Puget Sound) near Everett, Washington, while employed upon a licensed and registered barge by the Manson Construction and Engineering Company on July 8, 1940. The decedent was engaged at the time of his death in loading steel beams on the barge, which were placed thereon by a derrick anchored to a barge after being removed from an abandoned highway which was

being dismantled by the employer under contract with the Washington State Highway Department (Finding 7, R. 8). The barge, upon which the deceased was employed at the time of his death, was of the seagoing type (see Ptlfs. Exhibit 6, R. 18B) chartered by the employer for the project and by it towed to the site of the loading operations by the employer's tug.

When loaded with its cargo of steel, the barge was either towed by the tug or pulled by cables (depending upon the current) a distance of about 200 feet where it was then unloaded on the shore and later sold as junk (Finding 5, R. 7). Had the deceased survived, he would have accompanied the barge after loading as it was being towed along navigable waters to the unloading site and assisted in the unloading thereof (Finding X, R. 9). By trade, the deceased was a structural iron worker and part of his duties in loading the barge was to burn off iron stubs projecting from the steel to facilitate its loading.

The respondent, the state agency charged with the administration of the Washington's workmen's compensation act, rejected the petitioner's claim for widow's compensation for the reason "the injury was sustained on board a vessel in navigable waters and therefore under admiralty jurisdiction" (R. 3, 4). The joint board, respondent's appellate tribunal, affirmed (R. 5). On review, the Superior Court of King County concluded deceased's employment and death were not matters of local concern to which the Washington state compensation act was applicable, but were directly related to commerce and navigation, and petitioner's rights were governed by admiralty (Concl. I, R. 10), and dis-

missed petitioner's appeal for lack of jurisdiction. The Supreme Court of the State of Washington affirmed (R. 13-16).

Basis of State Courts Decision

The respondent and the Superior and Supreme Courts of the State of Washington concluded petitioner's rights were governed by a prior adjudication of the Supreme Court of the State of Washington in the case of *Comar v. Department of Labor and Industries*, 187 Wash. 99, 59 P. (2d) 1113, wherein the relevant federal decisions were reviewed. It was there held that where a workman, usually employed on the shore, was sent aboard a barge lying in navigable waters for the purpose of piling up sand for removal by a clam shovel, and was injured when so engaged, he could not be encompassed within the ambit of the state workmen's compensation act "since the unloading of a barge was a maritime transaction, not of purely local concern," (187 Wash. 103) but his remedy lay within the exclusive admiralty jurisdiction.

ARGUMENT OF RESPONDENT

The barge upon which deceased was drowned was a vessel within admiralty jurisdiction, though not self propelled.

The Raithmoor, 186 Fed. 849;
In re Sanford Ross, 196 Fed. 921;
Nogueira v. N. Y., N. H. & H. R., 281 U. S. 128.

Since the injury occurred on navigable waters, it was of admiralty cognizance.

The Plymouth, 70 U. S. (3 Wall.) 20.

However, since the decision by the United States Supreme Court in 1917, in the case of *Southern Pacific v.*

Jensen, 244 U. S. 205, state workmen's compensation acts have been held applicable to a limited type of injuries occurring on navigable waters, denominated "of mere local concern" when such application pertains to local matters, having only an incidental relation to navigation and commerce and does not

"* * * works material prejudice to the characteristic features of the general maritime law, or interfere with its uniformity." *(Southern Pacific v. Jensen, supra.)*

In the *Jensen* case, however, a workman injured on navigable waters while unloading a ship was held not embraced in the category of "mere local concern," but his rights were to be determined by the maritime law.

The findings of fact in this case establish that the husband of petitioner met his death by drowning while engaged in loading a barge on navigable waters. Such employment and locale of injury have been held in a series of cases decided by the United States Supreme Court not matters of local concern to which the state workmen's compensation acts were applicable but committed irrevocably to the exclusive admiralty jurisdiction by the necessity of uniform maritime rules, and article IV, section II, subdivision I of the United States Constitution and section 256 of the United States Judicial Code.

LOADING OF A VESSEL NOT A MATTER OF MERE LOCAL CONCERN

Even before the *Jensen* case, *supra*, the Supreme Court of the United States, in construing the rights of a person injured on navigable waters while engaged in loading a ship, held such employment to be exclusively within the purview of the maritime jurisdiction.

In *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 56 (1914), at page 61, the court said:

"The libelant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.' * * * "

A person engaged in loading freight as a stevedore was even held to be a seaman by the United States Supreme Court in the case of *International Stevedoring Co. v. Haverty*, 272 U. S. 50, reversing a decision of the Washington Supreme Court, reported in 134 Wash. 235.

In *Northern Coal & Dock Co. v. Strand*, 278 U. S. 142, the workman was engaged in what has been denominated as an amphibious occupation working the greater part of the time upon land in unloading coal but at other times being employed upon the ship in a similar capacity. He was killed while employed on the ship. In determining the status of his employment and its exclusive relation to the maritime jurisdiction, the court said, at page 144:

"Strand's employment contemplated that he should labor both upon the land and the water. When killed he was doing longshore or stevedore work on a vessel lying in navigable waters, according to his undertaking. His employment, so far as it pertained to such work, was maritime; the tort was maritime; and the rights of the parties must be ascertained upon a consideration of the maritime law. * * *

"The unloading of a ship is not matter of purely local concern. It has direct relation to commerce and naviga-

tion, and uniform rules in respect thereto are essential. The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred."

In *Nogueira v. N. Y., N. H. & H. R. Co.*, 281 U. S. 128, the workman was employed by the railroad company to load freight into cars on a float and sought to recover in an action under the federal employers' liability act. It was held that his remedy was within the exclusive admiralty jurisdiction. The court citing the *Jensen* and *Imbrovek* cases, *supra*, as authorities fixing the workman's status as maritime employment, at page 134, said:

"From the standpoint of maritime employment, it obviously makes no difference whether the freight is placed in the hold or on the deck of a vessel, or whether the vessel is a car float or a steamship. A car float in navigable waters is subject to the maritime law like any other vessel. The injury caused to petitioner in this case is thus as much within the exclusive admiralty and maritime jurisdiction as was that of the employee in *Southern Pacific Company v. Jensen*, *supra*, and recovery for the injury 'through workmen's compensation proceedings' could not 'validly be provided by state law.' "

The case of *Employers' Liability Assurance Corporation v. Cook*, 281 U. S. 233, is of particular persuasive force in this case. The district court had held that where an employee of the Ford Motor Company regularly employed as a mechanic had been assigned to unloading a ship on navigable waters and was injured, that the matter was of mere local concern and the Texas workmen's compensation act afforded him relief. The Supreme Court of the United States sharply dissented from this view, holding that the unloading of a ship is never a matter of purely local concern. The court said at page 236:

" * * * Whether Cook's employment contemplated that he should work regularly in unloading vessels

or only when specially directed so to do is not important. The unloading of a ship is not matter of purely local concern as we have often pointed out. Under the circumstances disclosed the State lacked power to prescribe the rights and liabilities of the parties growing out of the accident. * * * "

Where a longshoreman unloading a vessel lying in navigable waters was struck on the ship and precipitated upon the wharf, it was held in *Minnie v. Port Huron Terminal Co.*, 295 U. S. 647, that he was injured on navigable waters while engaged in a maritime service and his rights were governed exclusively by the maritime law.

A recent case to reach the United States Supreme Court was *South Chicago Coal and Dock Company v. Bassett*, 309 U. S. 251, decided February 26, 1940. The deceased in that case was employed on a lighter used for fueling steam boats on navigable waters. His duties consisted mainly of facilitating the flow of coal from his boat to the vessel being fueled and removing obstructions to the flow with a stick. He performed such additional tasks as throwing the ship's rope in releasing or making the boat fast. He performed no navigation duties. He was paid an hourly wage and slept at home. In holding that the deceased was not a seaman but was entitled to the benefits of the longshoremen's and harbor workers' compensation act, the court described the status of the deceased as follows:

"* * * What the court considered as supporting the finding of the deputy commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on

the water.' *Scheffler v. Moran Towing Co.*, 68 F. (2d) 11, 12. • • •"

The foregoing list of authorities establishes the rule that a person, such as the decedent in this case, who is engaged in loading a vessel upon navigable waters is employed exclusively under a maritime contract, the rights and liabilities of which must be adjudicated under the exclusive admiralty jurisdiction, and that such activities are not local in character so as to permit the application of the state compensation acts thereof, and this result follows whether decedent be classified as a longshoreman or as a casual worker under the doctrine of the *Bassett* case, *supra*.

In addition to the maritime character of decedent's employment, that of loading a vessel on navigable waters, further consideration should be given to the effect such application of the local law should have to a registered seagoing barge such as the decedent was employed on when drowned. The rationale of the *Jensen* case, *supra*, prohibits vessels on navigable waters from being harassed with conflicting state regulatioins with resultant impairment of the uniformity of the maritime law. If the Washington act is applicable here, so would the varying compensation enactments of Oregon and California, if the barge should journey there and be engaged under similar circumstances. A frustration of the desideratum of the *Jensen* case would ensue. The decision of the *Jensen* case and application of its line of demarcation has only been recently reaffirmed by the United States Supreme Court in the case of *Parker v. Motor Boats Sales*, 314 U. S. 244, 62 S. Ct. 221, decided December 8, 1941, which revitaiizes the doctrine of that case as to the non-intrusion of the local law to exclusively maritime torts.

Had petitioner's husband while on board the cargo barge been injured because of the negligence of a colliding vessel, can it be doubted his remedy against the offending vessel would be prescribed exclusively by the maritime law? If two systems of indemnity are available to a workman injured on navigable waters, dependent upon how the tort arose, an incongruous note would be injected into a field which the Supreme Court of the United States has decreed must be uniform. Such a result was prescribed in the case of *Murray v. Gerrick & Co.*, 291 U. S. 315, 54 S. Ct. 432, where the question arose in a non-maritime setting.

It is not accurate and may be misleading to characterize the decedent as engaged in dismantling a bridge at the time he was drowned, as petitioner does. The employer of decedent had a contract to dismantle a bridge. In so far as these operations were conducted on land, undoubtedly the local law applied. But the decedent was specifically engaged on the day of his death in loading a barge on navigable waters which subjected him to different rules of law than if he had been employed upon land in the demolition project. Similarly, cataloguing the cargo barge upon which decedent was employed when drowned as "a temporary storage space" as petitioner frequently does, cannot detract from the essential maritime character and service of the vessel at the time of decedent's drowning. While analyzing the nomenclature employed by petitioner, it might be pertinent to point out that after being unloaded from the cargo barge to "stock pile" it on the shore, the steel was thereafter sold to a junk company and thus entered the general avenues of trade and commerce of the state and nation.

Nor is it of any consequence that the cargo barge when loaded was only to proceed 200 feet along the navigable water before its cargo was unloaded. Maritime jurisdiction stems from the fact that the injury or tort occurs on navigable water and not upon the length of the journey involved.

This point was made clear by the United States Supreme Court in *London Co. v. Industrial Commission*, 279 U. S. 109, where, in answer to a similar contention, the Supreme Court of the United States said:

"Another objection to the admiralty jurisdiction here is that the vessel was not engaged in interstate or foreign commerce. It was employed only to run from shore to Santa Monica Bay, five or ten miles to the deep sea fishing place, and then return, and all within the jurisdiction of California. This argument is a complete misconception of what the admiralty jurisdiction is under the Constitution of the United States. Its jurisdiction is not limited to transportation of goods and passengers from one State to another, or from the United States to a foreign country, but depends upon the jurisdiction conferred in Article 3, Section 2, extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction."

Analysis of Cases Relied Upon by Petitioner for Allowance of Writ

None of the cases cited by petitioner in support of her application for a writ of certiorari involve the loading of a vessel on navigable waters, but refer to factual situations held local in character and supporting the application of the local law in a setting quite different than that in which deceased lost his life. *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59, involved the death of a diver engaged in sawing off an abandoned set of ways and the state law was held applicable. This deci-

sion undoubtedly was bottomed upon the observation of the Texas Supreme Court (216 S. W. 137) that the ways were a mere prolongation of the land since they were an abandoned dry-dock.

Similarly, can the decision in *State Industrial Board v. Terry & Tench Co.*, 273 U. S. 639, be explained, since the workman while stationed on a floating raft when injured was employed in the construction of a pier, likewise an extension of the land. *Rosengrant v. Havard*, 273 U. S. 664, merely involved the denial of a writ of certiorari to review a compensation award for the death of a lumber checker killed while on a floating barge, who could have performed this work just as well on shore. This decision was later explained by the Circuit Court of Appeals for the Fifth Circuit in the later case of *Moss Tie Company v. Tanner*, 44 F. (2d) 928, as based upon the grounds that the duties of the injured lumber inspector had no relation to carriage of the lumber by water or delivery of it from the barge upon termination of that carriage.

Alaska Packers Association v. Industrial Accident Commission, 276 U. S. 467, involved injuries to a cannery employee received on shore while pushing a boat in navigable waters, and the local law was held applicable. The same result was reached in *Sultan Railway and Timber Co. v. Department of Labor and Industries*, 277 U. S. 135, affirming the decision of the Washington Supreme Court (141 Wash. 172) that workmen employed on navigable waters in assembling and disassembling saw logs for mill-run purposes were amenable to the state compensation act. The recent case of *Parker v. Motor Boat Sales, supra*, reiterates the doctrine of exclusive jurisdiction in all matters not of mere local concern against state en-

croachment and denied the application of the Virginia compensation act to the death of a janitor occurring while riding in a boat in navigable waters at the instance of his employer. It was held despite the fact that the employment was predominantly non-maritime, the remedy of his beneficiaries was prescribed by the longshoremen's and harbor workers' compensation act.

Since the Washington State Supreme Court correctly concluded that the death of the deceased husband of petitioner was not a mere matter of local concern to which state jurisdiction could attach since he met his death while loading a vessel on the navigable waters of the United States, we earnestly pray that the petition for writ of certiorari in this cause be denied.

Respectfully submitted,

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